

Seton Hall University eRepository @ Seton Hall

Law School Student Scholarship

Seton Hall Law

2011

The Child Welfare Argument in the Same-Sex Marriage Debate

Jennifer M. Levanchy
Seton Hall Law

Follow this and additional works at: https://scholarship.shu.edu/student_scholarship



Part of the [Sexuality and the Law Commons](#)

Recommended Citation

Levanchy, Jennifer M., "The Child Welfare Argument in the Same-Sex Marriage Debate" (2011). *Law School Student Scholarship*. 62.
https://scholarship.shu.edu/student_scholarship/62

THE CHILD WELFARE ARGUMENT IN THE SAME-SEX MARRIAGE DEBATE

Jennifer M. Levanchy

INTRODUCTION

“Children are the world’s most valuable resource and its best hope for the future.” – JFK¹

Children have always been of the utmost importance to the government, at both the state and federal level. Thus, courts have always given special consideration to child welfare arguments in any legal context. In the battle over same-sex marriage, opponents have utilized the child welfare argument in justifying prohibitions against same-sex marriage. They argue that to allow same-sex marriage is to put children in harms way. Their child welfare argument asserts that children raised by same-sex parents are not equivalent in various ways to children of heterosexual parents. This paper will examine the various arguments and the relevant research, and address the ultimate question at the heart of the child welfare argument– Are children really worse off with same-sex parents?

In the past, opponents of same-sex marriage utilized the child welfare argument quite successfully, especially in the courts. This argument became one of the most pervasive arguments utilized by opponents of same-sex marriage. Its pervasiveness as an argument is due

¹ Letter from John F. Kennedy, U.S. President, to UNICEF (June 25, 1963) (on file with author)

to several traits that make up a child welfare argument in any legal context. First, as a society, the child welfare argument appeals to our emotional and moral sense of responsibility for a group of individuals who lack the ability to protect themselves. When opponents assert that children are the most innocent victims who will suffer the most from same-sex marriage², society becomes immediately invested, emotionally and morally, in the argument. “Child welfare is probably the ultimate emotional and moral high ground, and the side that captures it may well prevail.”³

Second, courts treat any child argument as warranting special attention. Courts uniformly recognize that child welfare is a “paramount State policy.”⁴ Whether or not a ban on same-sex marriage furthers this policy is the focus of this paper, but the pervasiveness of the child welfare argument derives from courts giving judicial deference to legislative determinations that bans on same-sex marriage will protect children. For instance, in *Hernandez v. Robles*, the court held that “the Legislature could rationally believe that it is better, all thing being equal, for children to grow up with both a mother and father.”⁵ Likewise, the dissent in *Goodridge v. Department of Public Health* cautioned that judicial deference to the child welfare argument was appropriate in

² Lynn D. Wardle, *The Potential Impact of Homosexual Parenting on Children*, 1997 U. ILL. L. REV. 833, 897 (1997).

³ Monte Neil Stewart, *Marriage Facts*, 31 HARV. J.L. & PUB. POL’Y 313, 358 (2008).

⁴ *Goodridge v. Department of Pub. Health*, 798 N.E.2d 941, 962 (Mass. 2003).

⁵ *Hernandez v. Robles*, 855 N.E.2d 1, 4 (N.Y. 2006).

the absence of conclusive evidence that the same-sex family structure is equivalent to the traditional family structure.⁶ Thus, opponents of same-sex marriage have utilized the child welfare argument often successfully to trigger judicial deference.

Third, the pervasiveness of the child welfare argument derives from its ability to be judged using objective standards. The argument either succeeds or fails based on scientific data. It is not based on subjective religious or moral beliefs. At one time opponents of same-sex marriage may have been able to rely on the lack of research on children in the same-sex familial structure to assert their argument. However, as this paper demonstrates, a collection of research has emerged that effectively rebuts the child welfare argument.

Today we know much more about children raised by same-sex parents than we did in the past. Current research, which will be discussed in detail throughout this paper, has confirmed the fact that children raised by same-sex parents develop no differently from children raised by heterosexual parents. Considering this, it is worthwhile to take a look back at the various aspects of the child welfare argument and again ask the question – Are children really worse off with same-sex parents?

Part I of this paper will focus on the current state of research on children raised by same-sex parents. What the new research tells us will prove critical in evaluating the child welfare

⁶ Goodridge, 798 N.E.2d at 979.

argument. The child welfare argument and all of its various parts will be explored in Part II.

Opponents have made several arguments regarding dual gender parenting, personal development, gender development, and sexual development. These arguments will be addressed individually in the shadow of the current research on children of same-sex parents. Finally, Part IV will address the ultimate question of whether children of same-sex parents are really worse off than children of heterosexual parents.

I. The Current State of Research

The landscape of research on same-sex parenting has evolved to better inform us of the ways in which the sexual orientation of parents affect their children. Research methods have improved, and we are now at a point where we are able to understand much more about same-sex parenting than we did years ago. This new research seeks to rebut any social presumptions we may have about homosexuality and parenting in general. Overall, the current research should help us in reconsidering the pervasiveness of the opponent's child welfare argument.

What does the social science data tell us? Early research on same-sex parenting indicated that there were “no differences” between children raised by same-sex parents and children raised

by heterosexual parents.⁷ Experts that examined these early studies found that they uniformly failed to indicate any differences in overall development between children raised by same-sex parents and those raised by heterosexual parents.⁸ For example, Patterson conducted a study in the early 1990s of a group of 4-to-9 year old children of lesbian mothers in the Bay greater San Francisco Bay area and found that these children were no different from other children in their age group in standardized measures of social competence and behavior problems.⁹

Opponents of same-sex marriage acted quickly to discredit these early “no differences” studies, motivated by their concern that these studies would affect public policy decisions regarding same-sex parenting, particularly same-sex marriage.¹⁰ Two sociologists Robert Lerner and Althea Nagai reviewed forty-nine empirical studies of lesbian parenting and concluded that all of the studies were flawed in various ways and unreliable in reaching the “no differences”

⁷ See generally Richard E. Redding, *It's Really About Sex: Same-Sex Marriage, Lesbian Parenting, and the Psychology of Disgust*, 15 DUKE J. GENDER L. & POL'Y 127, 135 (2008) (discusses the findings of early research that “demonstrate that there are no relevant differences in outcomes between children raised by heterosexual versus homosexual parents and that lesbian parenting has no negative effects on children”).

⁸ James G. Pawelski et al., *The Effects of Marriage, Civil Union, and Domestic Partnership Laws on the Health and Well-being of Children*, 118 PEDIATRICS 349, 359 (2006).

⁹ Charlotte J. Patterson, *Lesbian Mothers and Their Children: Findings from the Bay Area Families Study*, in LESBIANS AND GAYS IN COUPLES AND FAMILIES: A HANDBOOK FOR THERAPISTS, 420 (Joan Laird & Robert J. Green eds., 1996).

¹⁰ ROBERT LERNER & ALTHEA K. NAGAI, NO BASIS: WHAT THE STUDIES DON'T TELL US ABOUT SAME-SEX PARENTING 139 (2001) (warning that courts are accepting these studies in same-sex marriage cases and urging that “it is extremely important that the flaws in these studies be exposed so that the courts can weigh their relative value when making decisions that will dramatically impact both individual children and society at large”).

conclusion.¹¹ They took issue with the comparison groups, sampling, measurement, and statistical analysis.¹² In criticizing the sampling in these early studies, Lerner and Nagai pointed to inadequate sample sizes and use of convenience rather than random samples.¹³ Another critic, Professor Wardle, discredited the studies on both methodological and analytical grounds.¹⁴ Wardle argued that “social science evidence is very important, [but] thus far that evidence has been immature, biased, and unreliable. The day will come when thorough, serious, longitudinal research will be available, but that day has not arrived yet.”¹⁵

Well it seems that day has arrived. Experts have responded to the methodological and analytical concerns voiced by opponents of same-sex parenting and marriage, and have provided more recent studies that confirm the “no differences” conclusion of the earlier studies.¹⁶ Two studies in particular have been cited in various articles examining the current state of research on

¹¹ LERNER & NAGAI, *supra* note 10 at 139.

¹² *Id.* at 21.

¹³ *Id.* at 72, 96. See also William Meezan & Jonathan Rauch, *Gay Marriage, Same-Sex Parenting, and America's Children*, 15 THE FUTURE OF CHILDREN, 97, 100-102 (2005) (noting that smaller sample sizes make it more difficult to detect difference between groups and that convenience samples, which study participants provided by recruiting tools such as advertisements, may not be the most accurate representative samples).

¹⁴ Wardle, *supra* note 2.

¹⁵ Lynn D. Wardle, *The “Inner Lives” of Children in Lesbian Gay Adoption: Narratives and Other Concerns*, 18 ST. THOMAS L. REV. 511, 517 (2006).

¹⁶ See Jennifer Wainwright, Stephen T. Russell, and Charlotte J. Patterson, *Psychosocial Adjustment, School Outcomes, and Romantic Relationships of Adolescents With Same-Sex Parents*, 75 CHILD DEV. 1886 (2004) [hereinafter Wainwright Study]. See also Susan Golombok et al., *Children with Lesbian Parents: A Community Study*, 39 DEVELOPMENTAL PSYCHOL. 20 (2003) [hereinafter Golombok Study].

same-sex parenting.¹⁷ The Wainwright Study, conducted in 2004, drew from a nationally representative sample of over 12,000 adolescents and compared a group of forty-four adolescents being raised by lesbian parents to a group of forty-four adolescents being raised by heterosexual parents.¹⁸ The study concluded that “across a diverse array of assessments ... personal, family, and school adjustment of adolescents living with same-sex parents did not differ from that of adolescents living with opposite-sex parents.”¹⁹ The Golombok Study, conducted in 2003, drew from a geographic population of 14,000 mothers and their 7-year-old children in southwest England and studied a group of thirty-nine lesbian-mother families, seventy-two two-parent heterosexual families, and sixty families headed by single heterosexual mothers.²⁰ Again, the study indicated no differences in the ways the children developed. The expert noted that “children reared by lesbian mothers appear to be functioning well and do not experience negative psychological consequences arising from the nature of their family environment.”²¹ Experts who have reviewed these two studies note how the studies have addressed many of the methodological and analytical concerns. “We believe [these studies] represent the state of the art

¹⁷ See Meezan & Rauch, *supra* note 13, at 105-106. See also Pawelski, *supra* note 8, at 360.

¹⁸ Wainwright Study, *supra* note 16, at 1888.

¹⁹ *Id.* at 1895.

²⁰ Golombok Study, *supra* note 16, at 22-23.

²¹ Golombok Study, *supra* note 16, at 30.

studies that are as rigorous as research could today reasonable be expected to be.”²² Both studies, as Pawelski notes, were “planned and conducted by people who had no particular interest or investment in research regarding same-gender parents.”²³ In light of the fact that these two recent studies confirm the earlier “no differences” conclusion, it is also important to consider these earlier studies in addressing the validity of the child welfare argument.

This article encourages further research in the area of same-sex parenting, however, the current stock of research is uniformly conclusive enough to effectively address the child welfare argument in the context of the same-sex marriage debate.

III. The Children of Lesbian and Gay Parents: The Various Child Welfare Arguments

A. The Mommy and Daddy Argument

Opponents of the legal recognition of same-sex marriage argue that a child’s healthy development requires both a mother and father. This argument stresses a dual gender familial structure and insists that this structure is essential for a child’s health development. This dual gender parenting argument alleges that mothers and fathers each contribute something separate yet equally integral to a child’s development. “The marriage idea is that children need mothers

²² Meezan & Rauch, *supra* note 13, at 104.

²³ Pawelski, *supra* note 8, at 360.

and fathers, that societies need babies, and that adults have an obligation to shape their sexual behavior so as to give their children stable families in which to grow up.”²⁴ Same-sex parents inherently fail to adhere to the dual gender structure.

The dual gender parenting argument really has two layers. In making this argument, opponents first assert that mothers and fathers are different types of parents. Opponents argue that there are “gender-linked differences in child-rearing skills” and that “men and women contribute different (gender-connected) strengths and attributes to their children’s development.”²⁵ Their claim is that mothers and fathers are intrinsically different and thus hardwired to ascribe to different learned behavior. Second, opponents argue that these innate and learned differences in mothers and fathers are essential to the healthy development of a child. “Specifically, opponents argue that ... children need opposite-gender parents (and particularly a same-gender parent) for gender role development and socialization.”²⁶

At the first layer, opponents argue that mothers and fathers are different types of parents. They argue that mothers and fathers are intrinsically different types of parents and thus they are hardwired to possess different parenting skills. This “complementary hypothesis” suggests that the dual gender parental structure is ideal because mothers and fathers each bring “unique,

²⁴ Maggie Gallagher, *What Marriage Is For*, THE WEEKLY STANDARD, Aug. 4, 2003, at 1.

²⁵ Wardle, *supra* note 2, at 857.

²⁶ Redding, *supra* note 7, at 166.

complementary skills to child-rearing.”²⁷ Wardle, who embraces the “complementary hypothesis” notes the kinds of differences between mothers and fathers. According this hypothesis, mothers are nurturers. In relation to fathers, mothers ““tend to talk and play more gently with infant children”.²⁸ They “smile and verbalize more to the infant than fathers do”²⁹, and generally rate their infant sons more cuddlier than fathers do.”³⁰ They are also “more expressive, integrative, and nurturing.”³¹

Fathers, in particular, have been the focus of the dual gender argument.³² According to the “complementary hypothesis”, fathers are leaders and enforcers in the dual gender parenting structure. They “tend to appreciate the value of and foster child interaction with extrafamilial socializing influences”, “provide instrumental leadership” and “establish and enforce standards regarding unacceptable emotions and behaviors.”³³ They also contribute to the physical and

²⁷ Redding, *supra* note 7, at 165-166.

²⁸ Wardle, *supra* note 2, at 857-858 (citing KYLE D. PRUETT, *THE NURTURING FATHER* 33 (1987)).

²⁹ *Id.* at 858 (citing Tiffany Field, *Interaction Behaviors and Primary Versus Secondary Caretaker Fathers*, 14 *DEVELOPMENTAL PSYCHOL.* 183-184 (1978)).

³⁰ *Id.* at 858 (citing Colette Jones, *Father-Infant Relationships in the First Year of Life*, in *DIMENSIONS OF FATHERHOOD* 92, 105 (Shirley M.H. Hanson & Frederick W. Bozett eds., 1985).

³¹ *Id.* (citing Robert H. Bradley, *Fathers and the School-Age Child*, in *DIMENSIONS OF FATHERHOOD*, *supra* note 30, at 141, 152).

³² Opponents of same-sex marriage have relied heavily upon studies that indicate the negative effects of a “fatherless” family and society. For various reasons, which will be discussed later in this article, reliance upon these studies in making the child welfare argument, is flawed.

³³ Wardle, *supra* note 2, at 858 (citing Bradley, *supra* note 31, at 141, 152).

recreational aspect of their child's development. They play more "physical and tactile" games with their children than mothers do,³⁴ and use fewer toys than mothers do.³⁵

The second layer of the dual gender argument focuses on the "complementary" aspect of dual gender parenting. Opponents argue "children generally develop best, and develop most completely, when raised by both a mother and father and experience regular family interaction with both genders' parenting skills during their years of childhood."³⁶ Opponents stress in particular the "fatherless" aspect of the dual gender parenting argument, calling to attention several risks (such as delinquency) inherent in a "fatherless" structure.³⁷ According to the dual gender parenting argument, the father, as the leader and enforcer, plays an essential role in a child's upbringing.³⁸

³⁴ *Id.* at 857 (citing Jones, *supra* note 30, at 102).

³⁵ *Id.* (citing Kyle Pruett, *The Paternal Presence*, 74 FAMILIES SOC'Y 46, 48 (1993)).

³⁶ Wardle, *supra* note 2, at 860.

³⁷ See Judith Stacey & Timothy J. Biblarz, *(How) Does the Sexual Orientation of Parents Matter?*, 66 AM. SOC. REV. 159, 162 (2001) (noting that Wardle "extrapolates (inappropriately) from research on single-mother families to portray children of lesbians as more vulnerable to everything from delinquency, substance abuse, violence, crime, teen pregnancy, school dropout, suicide, and even poverty").

³⁸ See BRONISLAW MALINOWSKI, *SEX, CULTURE AND MYTH* 63 (1962) ("The most important moral and legal rule concerning physiological site of kinship is that no child should be brought into this world without a man – and one man at that, assuming the role of sociological father, that is of guardian and protector, the male link between the child and the rest of the community. This generalization amounts to a universal sociological law ...").

There are several flaws in the “fatherless” argument, specifically in the research on which opponents rely. First, opponents have taken research out of context to fashion the “fatherless” argument. In asserting that all children need fathers to develop normally, they rely on studies that compare children in intact heterosexual families with children in single parent families.³⁹ “Most researchers have concluded that it is the *number* of parents and their resources, as well as the disruptive effects and conflict of divorce (the route to single-family life for most children) that account for these differential risks.”⁴⁰ In pointing out the negative effects on children of growing up in a single parent family, all that these studies show is that two parents are better than one.⁴¹ They say nothing about gender. Opponents conflate the two-parent structure with the dual gender structure. They look, inappropriately, to studies that fail to compare children raised by same-sex parents with children raised by heterosexual parents. In doing so, they ignore the fact that same-sex parents can satisfy the two-parent ideal.

³⁹ Gregory M. Herek, *Legal Recognition of Same-Sex Relationships in the United States: A Social Science Perspective*, 61 AM. PSYCHOLOGIST 607 (2006) (citing SARA McLANAHAN & GARY SANDEFUR, GROWING UP WITH A SINGLE PARENT: WHAT HURTS, WHAT HELPS 44 (1994)).

⁴⁰ Leslie Cooper & Paul Cates, *Too High a Price: The Case Against Restricting Gay Parenting* (ACLU/Lesbian, Gay, Bisexual, Transgender Project, New York, N.Y.), 2006, at 33.

⁴¹ See Herek, *supra* note 39, at 607. See also Wardle, *supra* note 2, at 857-865 (noting studies have found that children in single-parent families are more prone to violence and crime, teen pregnancy, and poverty).

Second, current research on children raised by same-sex parents suggests that gender does not play a determinative role in a child's healthy development.⁴² Assuming it is true that mothers and fathers are different kinds of parents, the body of research suggests that these differences may not be essential to a child's healthy development.⁴³ "When children fare well in two-parent lesbian-mother or gay-father families, this suggests that the gender of one's parents cannot be a critical factor in child development. Results of research...cast doubt upon the traditional assumption that gender is important in parenting."⁴⁴ Even assuming for a moment that gender does play a determinative role in a child's healthy development, "a two-parent mother and father family may be the best family structure for the child, but the law has never required that parents conform to a perfect model of family life."⁴⁵ Even if the dual gender parental structure is ideal, it has never been a prerequisite to obtaining a marriage license. Nor

⁴² See Wainwright Study, *supra* note 16, at 1886. See also Golombok Study, *supra* note 16, at 20. Both studies indicate that children raised by same-sex parents as compared to children raised by heterosexual parents, develop no differently psychologically and socially.

⁴³ Stacey, *supra* note 37, at 171 (examining 21 studies that all found "no significant differences between children of lesbian mothers and children of heterosexual mothers in anxiety, depression, self-esteem, and numerous other measures of social and psychological adjustment").

⁴⁴ Charlotte J. Patterson, *Children of Lesbian and Gay Parents*, 15 ASS'N FOR PSYCHOL. SCI. 241, 243 (2006).

⁴⁵ Redding, *supra* note 7, at 134.

should it be in light of the fact that the family structure has diversified - less than one-third of American children live in these traditional families.⁴⁶

Third, the dual gender argument (and in particular Wardle's conclusions about mothers and fathers) reflects traditional gender roles. Opponents are essentially arguing that children need mothers who are caretakers and fathers who are leaders and enforcers, and that these parenting roles are not interchangeable. A mother who is the leader and enforcer and a father who is the caretaker defies the dual gender model. A flaw in the dual gender argument is that it relies on a traditional parental structure that adheres to normative social gender roles. The problem, though, is that this structure may no longer be "normative" - many families today exist within a nontraditional family structure.⁴⁷ "Some of the most prominent trends concerning family change include the entry of women into the workforce, delayed childbearing, single parenting, and the growth of nonfamily households (individuals living together but unrelated biologically or legally)."⁴⁸ It is arguably unrealistic and impracticable to adhere to a dual gender structure that continues to adhere to traditional gender roles, especially in light of the shift from

⁴⁶ Carlos A. Ball & Janice F. Pea, Warring with Wardle: Morality, Social Science, and Gay and Lesbian Parents, 1998 U. Ill. L. Rev. 253, 302-303. (1998) (citing Adele Eskeles Gottfried & Allen W. Gottfried, *Demography and Changing Families: Introduction to the Issues*, in REDEFINING FAMILIES: IMPLICATIONS FOR CHILDREN'S DEVELOPMENT, 3 (Adele Eskeles Gottfried & Allen W. Gottfried eds., 1994).

⁴⁷ Redding, *supra* note 7, at 134.

⁴⁸ See Gottfried & Gottfried, *supra* note 46, at 3-4.

traditional family structures. The dual gender argument is “no longer adequate to provide useful information for legal decision making in the face of the prevalence of nontraditional families.”⁴⁹

The dual gender argument has been constructed using data that shows children do better with two parents than one.⁵⁰ Same-sex parents are capable of satisfying the two-parent ideal, as shown in the body of research that indicates children of same-sex parents develop no differently than children raised by heterosexual parents.⁵¹

B. Personal Development: The Troubled Child

As an extension of the dual gender parenting argument and perhaps based on the view that homosexual parents are incapable of being good parents, opponents of same-sex marriage focus on the personal development of children raised by same-sex parents.⁵² “A child raised by two women or two men is deprived of extremely valuable developmental experience and the

⁴⁹ Ball & Pea, *supra* note 46, at 304.

⁵⁰ See Cooper & Cates, *supra* note 40.

⁵¹ See Wainwright Study, *supra* note 16, at 1886. See also Golombok Study, *supra* note 16, at 20.

⁵² Opponents argue children of same-sex parents are harmed developmentally because of the absence of the dual gender parental structure, but it is also worth noting that they also argue homosexual parents have different parenting attitudes and behaviors which are harmful to their children. This particular argument focuses on the “source” of the harm (the homosexual parents) rather than the “subject” of the harm (the children). This article focuses on the “subject” of the harm and considers “if” and “how” they are harmed.

opportunity for optimal individual growth and interpersonal development.”⁵³ Opponents argue that children being raised by same-sex parents encounter increased psychological/emotional, social, and cognitive developmental difficulties.⁵⁴ This argument has gained significant attention in the context of the same-sex marriage debate. “Given historic social prejudices against homosexuality, the major issue deliberated by judges and policy makers has been whether children of lesbian and gay parents suffer higher levels of emotional and psychological harm.”⁵⁵ As a result, it has been the main focus of researchers studying same-sex parenting.⁵⁶

In examining a child’s personal development, researchers have examined several specific factors: “self-esteem, anxiety, depression, behavioral problems, performance in social arenas (sports, school and friendships), use of psychological counseling, mothers’ and teachers’ reports of children’s hyperactivity, unsociability, emotional difficulty, or conduct difficulty.”⁵⁷ These researchers then seek to compare children raised by same-sex parents with those children raised by heterosexual parents. The operative question is whether children raised by same-sex parents

⁵³ Wardle, *supra* note 2, at 863.

⁵⁴ See also *APA Policy Statement, Sexual Orientation, Parents and Children, Adopted by the APA Council of Representatives* (Am. Psychol. Ass’n), July 2004, at 1 (noting that “some observers have expressed fears that children in the custody of gay or lesbian parents would be more vulnerable to mental breakdown, would exhibit more adjustment difficulties and behavior problems, or would be less psychologically healthy than other children”).

⁵⁵ Stacey, *supra* note 37, at 171.

⁵⁶ Cooper & Cates, *supra* note 40, at 27.

⁵⁷ Stacey, *supra* note 37, at 169, 171.

differ in these areas of personal development from those children raised by heterosexual parents.

Are they really worse off, as opponents argue?

The developed body of research on personal developments fails to support the theory that children of same-sex parents are worse off than children of heterosexual parents. Studies have consistently supported the conclusion that there are “no differences” between children of same-sex parents and heterosexual parents in regards to personal development.⁵⁸ In a comprehensive study that examined findings from 21 psychological studies conducted between 1981 and 1998, Stacey found that there were no significant differences between children raised by same-sex parents and children raised by heterosexual parents in the areas of “anxiety, depression, self-esteem, and numerous other measures of social and psychological adjustment.”⁵⁹ Stacey also noted that there is no proven relationship between parental sexual orientation and a children’s cognitive ability.⁶⁰ Other experts who have reviewed the studies agree that they have failed to demonstrate any differences between children of same-sex parents and children of heterosexual

⁵⁸ See Stacey, *supra* note 37, at 171. See also Meezan, *supra* note 13, at 103 (noting that “children raised by same-sex environments show no differences in cognitive abilities, behavior, general emotional development, or such specific areas of emotional development as self-esteem, depression, or anxiety”).

⁵⁹ Stacey, *supra* note 37, at 171.

⁶⁰ *Id.* at 172.

parents “on personality measures, measures of peer group relations, self-esteem, behavioral difficulties, academic success, or warmth and quality of family relationships.”⁶¹

Recent studies also support the conclusion that children raised by a same-sex parents develop no differently from children raised by heterosexual parents. The Wainwright study, conducted in 2004, concluded that adolescents living with lesbian parents were similar to peers with heterosexual parents in measures of “self-esteem, depression, anxiety, school ‘connectedness’ and school success.”⁶² Similarly, the Golombok study, conducted in 2003, found no differences in children in “abnormal behaviors ... self-esteem, or psychiatric disorders.”⁶³ The body of research was compelling enough for leading professional health and child welfare organizations to endorse same-sex parenting.⁶⁴ For example, The American Academy of Pediatrics recognizes that “a considerable body of professional literature provides evidence that children with parents who are homosexual can have the same advantages and the

⁶¹ Ellen C. Perrin, *Technical Report: Coparent or Second-Parent Adoption by Same-Sex Parents*, 109 PEDIATRICS 341, 342 (2002)

⁶² Wainwright Study, *supra* note 16, at 1895.

⁶³ Golombok Study, *supra* note 16, at 26.

⁶⁴ See the Child Welfare League of America, American Medical Association, American Psychiatric Association, American Psychological Association, American Academy of Child and Adolescent Psychiatry, North American Council on Adoptable Children, and American Academy of Family Physicians.

same expectations for health, adjustment, and development, as can children whose parents are heterosexual.”⁶⁵

The current state of research supports the conclusion that children raised by same-sex parents develop in much the same way as children raised by heterosexual parents do. It is worth noting though “that in the few cases where differences in emotional development are found, they tend to favor children raised by lesbian families.”⁶⁶ Meezan points out one study that found children of lesbian mothers tend to be less aggressive, bossy, and domineering than children of heterosexual mothers.⁶⁷ Another study found that children of heterosexual parents had more psychiatric difficulties and more psychiatric referrals.⁶⁸ The Wainwright Study also found that children with same-sex parents felt a greater sense of school-connectedness than children of heterosexual parents.⁶⁹

⁶⁵ American Academy of Pediatrics: Committee on Psychosocial Aspects of Child and Family Health, *Coparent or Second Parent Adoption by Same-sex Parents*, 109 PEDIATRICS 339 (2002)(This policy statement goes on to state that “When two adults participate in parenting a child, they and the child deserve the serenity that comes with legal recognition”).

⁶⁶ Meezan, *supra* note 13, at 103.

⁶⁷ *Id.* (citing Ailsa Steckel, *Psychosocial Development of Children of Lesbian Mothers*, in GAY AND LESBIAN PARENTS 75, 81 (Frederick W. Bozett ed., 1987)).

⁶⁸ *Id.* (citing Susan Golombok et al., *Children in Lesbian and Single-Parent Households: Psychosexual and Psychiatric Appraisal*, 24 J. OF CHILD PSYCHOL. AND PSYCHIATRY 551 (1983)).

⁶⁹ Wainwright Study, *supra* note 16, at 1895.

Another related argument that opponents assert is that children of same-sex couples will be subject to stigmatization by their peers and the community. “It is contrary to the welfare of foster children ‘to place them in a home where they will have to endure the stigma of residing in a home that many in the community may not approve of.’”⁷⁰ Opponents are concerned that subjecting children to social stigmatization (teasing and bullying) is not only unfair to them but also unhealthy for their development. This argument gives rise to two separate questions. First, are children of same-sex parents being teased more? Second, does this teasing affect their personal development and their ability to maintain relationships with peer?

In considering the first question, it is realistic to accept the possibility that children of same-sex couples may be teased, especially in light of the fact that there is still some social stigma attached to homosexuality. In one study, adult children of divorced lesbian mothers recalled more teasing than adult children of divorced heterosexual parents.⁷¹ In one study, 10 year-old children did recount being teased by their peers and admitted to feeling angry, upset, and sad.⁷² One response to the social stigmatization argument is that this issue can be dealt with outside of the context of same-sex marriage. Indeed, children get teased for various reasons,

⁷⁰ Cooper & Cates, *supra* note 40, at 89.

⁷¹ FIONA L. TASKER & SUSAN GOLOMBOK, *GROWING UP IN A LESBIAN FAMILY: EFFECTS ON CHILD DEVELOPMENT* 77-102 (1997).

⁷² Nanette Gartrell, *Interviews With Ten-Year-Old Children*, 70 AM. J. OF ORTHOPSYCHIATRY 518 (2005).

apart from their parents' sexual orientation. "Unfortunately, children get teased for all sorts of reasons, e.g., their appearance, their skill at sports, what their parents look like, the fact that their family is a religious or ethnic minority."⁷³ One response to this problem is to deal with it in a more effective and less intrusive way. Anti-bullying legislation provides a means to deal with social stigmatization by attacking the problem at its source.

The material question though is whether the teasing will actually harm children of same-sex parents in any lasting way. Research says no. "Given some credible evidence that children with gay and lesbian parents, especially adolescent children, face homophobic teasing and ridicule that may find difficult to manage, the children in these studies seem to exhibit impressive psychological strength."⁷⁴ In a study that interviewed 10-year-old children of same-sex parents, children demonstrated the ability to speak out against their peers in a refreshingly mature and informed manner. One 10 year-old child recounted, "One kid said one time that he didn't like gays and lesbians and I said, 'You mean like my mom?' and he said 'I didn't know your mom was.' So I told him that if he had a friend and he was Black would he stop being his friend and he said 'No.' I told him it was the same thing."⁷⁵ Another 10 year-old stated "It hurts my feelings because I know it's not bad. Some of the people who really care about me and I care

⁷³ Cooper & Cates, *supra* note 40, at 89.

⁷⁴ Stacey, *supra* note 37, at 171, 172.

⁷⁵ Gartrell, *supra* note 72, at 520.

about are lesbian and gay people. If those kids knew somebody who was gay, they wouldn't say the things they do.”⁷⁶ Research that indicates no differences in personal development between children of same-sex parents and children of heterosexual parents indicates that the teasing has no permanent, negative effect on the children.⁷⁷ The Wainwright Study reveals that adolescents have positive peer relations, no difference in the number or quality of friends, or the amount of support they receive from male or female friends.⁷⁸ The occasional teasing has not affected them in any permanent way.

In a seminal child custody case, the Court said “private biases may be outside the reach of the law, but the law can not, directly or indirectly, give them effect.”⁷⁹ The same is true here – private biases against homosexuals should not be given effect by a law that forbids same-sex marriage because it claims to protect children from teasing. Opponents of same-sex marriage have failed to provide evidence that legalizing same-sex marriage will increase the teasing. If anything, it is logical to posit that if same-sex marriage were permitted, the social stigma attached to homosexuality might lessen, thereby reducing the incidents of teasing.

⁷⁶ Gartrell, *supra* note 72, at 520.

⁷⁷ See Stacey, *supra* note 37, at 171.

⁷⁸ Wainwright Study, *supra* note 16, at 1886.

⁷⁹ *Palmore v. Sidoti*, 466 US 429 (1984).

As demonstrated by the studies cited above, a child's personal development is not negatively affected by their parents' sexual orientation. Children of same-sex parents are no different from children of heterosexual parents, apart from their family structure. Research has supported this. "The picture that emerges from research is one of general engagement in social life with peers, parents, family members, and friends."⁸⁰

C. Gender Identity and Behavior – Am I a Boy or a Girl? Am I Masculine or Feminine?

Opponents of same-sex marriage argue that the gender development of children raised by same-sex parents will be different from children raised by heterosexual parents. There are essentially two parts of this argument. The first is that these children's gender identity development will be affected – that their psychological sense of being male or female will be skewed. The second argument is that children will demonstrate abnormal gender behavior and that they will not be masculine or feminine enough.

In regards to gender identity, research has failed to provide evidence of any gender identity abnormality.⁸¹ Children are not confused about their gender. "None of the more than 300 children studies to date have shown evidence of gender identity confusion, wished to be the

⁸⁰ APA Policy Statement, *supra* note 54, at 1.

⁸¹ Cooper & Cates, *supra* note 40, at 29 (citing Perrin, *supra* note 61, at 342).

other sex, or consistently engaged in cross-gender behavior. No differences have been found in the toy, game, activity, dress, or friendship preferences...”⁸² Likewise, there is “no evidence that children of lesbian and gay parents are confused about their gender identity, either in childhood or adulthood, or that they are more likely to be homosexual.”⁸³

The major flaw in this argument is that it rests upon the presumption, as discussed above, that gender plays a determinative role in parenting. It assumes that a child with no mother will grow up lacking any female influence. It is perhaps reasonable to assume that a child who lives in a closed environment with no female (or in the alternative, male) interactions will be confused about their gender. But children do not live in bubbles. They are molded and influenced by not only their immediate families, but by their extended families and community.

The second argument focuses more on the social aspect of gender development. Opponents argue that children raised by same-sex couples will not demonstrate normal gender behavior. To opponents, this behavior is the requisite masculinity for boys and femininity for girls. Research is mixed on this argument.⁸⁴ “Evidence on gender behavior (as opposed to identification) is mixed; some studies find no differences, whereas others find that girls raised by lesbians tend to be more “masculine” in play and aspirations and that boys of lesbian parents less

⁸² Perrin, *supra* note 61, at 342.

⁸³ Meezan, *supra* note 13, at 103.

⁸⁴ *Id.*

aggressive.”⁸⁵ Some studies identify differences in gender behavior and masculinity and femininity.⁸⁶ These differences are worth discussing.

Stacey suggests that researchers and advocates of same-sex marriage have downplayed some key differences in gender behavior between children of same-sex couples and children of heterosexual couples. She notes several differences. In one study, daughters raised by same-sex couples “more frequently dress, play, and behave in ways that do not conform to sex-typed cultural norms”, have “greater interest in activities associated with both masculine and feminine qualities that involve participation of both sexes”, and have “higher aspirations to nontraditional gender occupations”.⁸⁷ One study also indicated that daughters are more “sexually adventurous and less chaste.”⁸⁸ Sons, on the other hand, are less aggressive in their play preferences.⁸⁹ “Sons of lesbian mothers behave in less masculine ways.”⁹⁰ However, they have greater gender

⁸⁵ Meezan, *supra* note 13, at 103.

⁸⁶ Stacey, *supra* note 37, at 168 (stating “on some measures meaningful differences have been observed in predictable directions”).

⁸⁷ *Id.* at 169 (citing Richard Green, et al., *Lesbian Mothers and Their Children: A Comparison with Solo Parent Heterosexual Mother and Their Children*, 15 ARCHIVES OF SEXUAL BEHAVIOR 167 (1986)).

⁸⁸ *Id.* at 171 (citing Tasker & Golombok, *supra* note 71, at 102-134).

⁸⁹ *Id.* at 168.

⁹⁰ *Id.*

conformity when it comes to occupational goals.⁹¹ They are also “less sexually adventurous and more chaste.”⁹²

What this research suggests is that the sexual orientation of parents may play a role in the gender behavior, as opposed to the identity⁹³, of their children. As Stacey concludes, “Such evidence...implies that lesbian parents may free daughters and sons from a broad but uneven range of traditional gender prescriptions. It also suggests that the sexual orientation of mothers interacts with the gender of the children in complex ways to influence gender preferences and behavior.”⁹⁴ However, the research does not lead us to the conclusion that children are harmed by nonconformity to gender roles. “Developmental psychologists recognize that this is not an issue of adjustment; neither conformity to stereotypes about how girls or boys should behave nor departure from sex stereotypes means anything about whether an individual is well-adjusted.”⁹⁵ This lack of harm is highlighted by the daughter of a lesbian parent who strives to be a doctor, as opposed to a stay at home mother.

⁹¹ Stacey, *supra* note 37, at 168.

⁹² *Id.* at 171.

⁹³ Identity in this context refers to children being able to identify as male or female. Behavior, on the other hand, is demonstrating particular masculine or feminine qualities in a social context.

⁹⁴ Stacey, *supra* note 37 at 168, 170

⁹⁵ Cooper & Cates, *supra* note 40, at 29.

D. Sexual Identity and Behavior – Am I a Homosexual?

Opponents of same-sex marriage assert that children raised by same-sex couples will grow up to be homosexual themselves. This argument focuses on the consequences of the familial environment and asserts that children, through learned behavior, will eventually adopt the sexual identity of their parents.⁹⁶ Opponents argue that homosexuality is a “learned pathology that parents pass onto their children through processes of modeling, seduction, and contagion.”⁹⁷ Thus, in prohibiting same-sex marriage, opponents argue that same-sex parents are denied the opportunity to further “corrupt” their children.⁹⁸ Robert Talton, a member of the Texas House of Representatives and opponent of same-sex parenting, stated, “What I’m trying to protect them [children] from is learned behavior. I think we should expose them to the straight life as much as we can.”⁹⁹ It is not surprising that the sexual behavior and identity of children of same-sex parents are among the most “politically sensitive” in the same-sex marriage debate.¹⁰⁰

This argument really is two-fold because it contemplates not only disturbances in sexual “identity” (children later identifying themselves as homosexual), but also disturbances in “behavior”. Thus, opponents argue that children will not only eventually self-identify as

⁹⁷ Paul Cameron & Kirk Cameron, *Homosexual Parents*, 31 ADOLESCENCE (1996).

⁹⁸ *Id.*

⁹⁹ Cooper & Cates, *supra* note 40, at 88.

¹⁰⁰ Stacey, *supra* note 37, at 177.

homosexual, but will also experience same-sex erotic attractions and sexual experiences, even if only temporary. Wardle argues “the most obvious risk to children from their parents’ homosexual behavior suggested by current studies relates to the sexual development of the child. Both theory and empirical studies indicate the potential that disproportionate percentages of children raised by homosexual parents will develop homosexual interests and behaviors.”¹⁰¹ Wardle makes the mistake of conflating “interests and behavior” though with “identity.” He also relies upon studies that are flawed in various ways.¹⁰²

First, in regards to identity, research has not been consistent. One article that reviewed several studies noted that “with the exception of the Golombok and Tasker study, the percentage of children of gays and lesbians in the above-mentioned studies who were identified as gay or lesbian ranged from zero to nine.”¹⁰³ The studies though failed to reach a consistent conclusion that children raised by homosexual parents were at a greater risk of becoming homosexual.¹⁰⁴

One view of the research is to conclude that children raised by homosexual parents are not at a greater risk of identifying as homosexuals later on in life. “Young adults raised by same-

¹⁰¹ Wardle, *supra* note 2, at 852.

¹⁰² *Id.* at 852, 853 (Wardle looks at one study that looked at post-adolescents and found that 23.5 percent had identified themselves as homosexual. However, the sample was “seriously flawed”. Wardle also looks at another study that indicates the sexual orientation of parents has an effect on the sexual orientation of their children and concedes that the study is “far from definitive and too small to provide reliable conclusions”).

¹⁰³ Ball & Pea, *supra* note 46, at 283, 284.

¹⁰⁴ Ball & Pea, *supra* note 46, at 280.

sex couples are not more likely to self-identify as bisexual, gay, or lesbian.”¹⁰⁵ The American Academy of Child and Adolescent Psychiatry asserts “there is no basis on which to assume that a parental homosexual orientation will increase the likelihood of or induce a homosexual orientation in the child.”¹⁰⁶ Many questions remain unanswered about sexual orientation, particularly whether it is a result of genetic or socialization factors, or perhaps both. However, “evidence indicates that the vast majority of lesbian and gay adults were raised by heterosexual parents, and the vast majority of children raised by lesbian and gay parents eventually grow up to be heterosexual.”¹⁰⁷

Assuming for a moment that a discrepancy between children of homosexual and heterosexual parents exists, it is important to consider several explanations. First, it is not unreasonable to assume that children raised by homosexual parents would be more comfortable self-identifying as homosexual. This may explain any discrepancy that exists. Second, if we assume for a moment that sexual orientation is genetic, then any prohibition on same-sex marriage would do little to protect children from a heightened risk of becoming homosexual themselves. “It is indisputable, however, that, many gay men, lesbians, and bisexuals already are

¹⁰⁵ Stacey, *supra* note 37, at 171 (citing Tasker & Golombok, *supra* note 71, at 77).

¹⁰⁶ American Academy of Child and Adolescent Psychiatry, *Policy Statement: Gay, Lesbian, and Bisexual Parents*, (AM. ACADEMY OF CHILD AND ADOLESCENT PSYCHIATRY) Dec. 2, 2005.

¹⁰⁷ Charlotte J. Patterson, Gay Fathers, in *The Role of the Father in Child Development* 397, 408 (Michael E. Lamb ed., 2004).

parents, and there is no reason to doubt that still more will conceive and adopt children in the future whether or not they gain the right to marry.”¹⁰⁸

The second aspect of the opponent’s argument involves the sexual behaviors and attitudes of children raised by homosexual parents. Research on this issue seems to be more consistent in indicating some connection between the sexual orientation of parents and the sexual behavior and attitudes of their children.¹⁰⁹ The study that Stacey examines shows a greater number of young adult children raised by lesbian mothers having reported homoerotic relationships.¹¹⁰ In addition, the subjects reported being more open to the possibility of having a homoerotic relationship in the past, present, and future.¹¹¹ Meezan notes that some studies indicate that children of same-sex parents “adopt more accepting and open attitudes toward various sexual identities and are more willing to question their sexuality.”¹¹² Other studies report that “young women raised in lesbian-headed families are more likely to have homosexual friends and to disclose that they have had or would consider having same-sex sexual relationships.”¹¹³ These studies tend to suggest that a parent’s sexual orientation has an effect on their child’s sexual

¹⁰⁸ Herek, *supra* note 39, at 607.

¹⁰⁹ Stacey, *supra* note 37, at 170. 171 (citing Tasker & Golombok, *supra* note 71, at 77).

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² Meezan, *supra* note 13, at 103.

¹¹³ Meezan, *supra* note 13, at 103.

behavior and attitudes. “Collectively, the studies suggest that children raised by lesbian parents are significantly more likely to experience homoerotic attraction, to consider homosexual relationships, and to engage in homosexual behavior.”¹¹⁴

As is the case with sexual identity, there are several ways to view the research on sexual behavior and attitudes. First, it not unreasonable to assume that children raised by homosexual parents would be more willing to admit to such behaviors and attitudes than children raised by heterosexual parents. The same problem exists in this context as it does with identity. Second, the difference between sexual behavior and attitudes of children of homosexual and heterosexual parents can be viewed as encouraging an open and accepting familial environment. “Just how to view such differences in behavior and attitude is a matter of disagreement. Where conservatives may see lax or immoral sexual standards, liberals may see commendably open-minded attitudes.”¹¹⁵ To be brought up in a more liberal environment shouldn’t necessarily be considered “harmful” to children.

The mental health profession does not regard homosexuality as either an illness or disability. It is important to consider this in light of the fact that the studies regarding sexual identity and behavior may be viewed as inconclusive. With the absence of any proof of harm to

¹¹⁴ Redding, *supra* note 7, at 148.

¹¹⁵ Meezan, *supra* note 13, at 103.

children, opponents of same-sex marriage seem to be resting their sexual identity and behavior argument on their own moral judgments regarding homosexuality. This article argues that morality alone, without supporting social science data, should not justify a ban on same-sex marriage.

E. Protecting the Children of Heterosexual Couples: The Breakdown of Marriage and the Domino Effect

Opponents also look to the children of heterosexual couples for another argument against same-sex marriage. They argue that permitting same-sex marriage would harm children of heterosexual couples. If same-sex marriage is allowed, the argument goes, then there is a total breakdown in the institution of marriage. “It would give sanction and approval to the creation of a motherless or fatherless family as a deliberately chosen ‘good’ ...Motherless and fatherless families would be deemed just fine.”¹¹⁶ This argument is closely intertwined with the “marriage” argument asserted by opponents of same-sex marriage. This paper’s main focus is on the child welfare argument, although the “marriage” argument, one that seeks to preserve tradition, warrants a brief discussion.

¹¹⁶ Gallagher, *supra* note 24, at 1.

There are many subparts of the “marriage” argument. Opponents argue that allowing same-sex marriage would degrade the institution of marriage itself. Opponents further argue that allowing same-sex marriage would produce tangible negative effects, such as causing a social “indifference” to marriage.¹¹⁷ If homosexuals are allowed to marry, then it will cause a domino effect; less people will enter into marriage, and conversely, that more people will divorce.¹¹⁸ This implicates the two-parent ideal discussed above. The child of a homosexual parent will be faced with the disadvantages of growing up in a single-family household. The principal flaw in this argument is that it contemplates a domino effect that is speculative and tenuous. The argument that children of heterosexual parents will be harmed by allowing same-sex marriage is perhaps the weakest of the child welfare arguments. There is no evidence that suggests that these children will be harmed at all.

IV. Is Same-sex Parenting Really Different? Is it Really Less?

“More than 25 years of research have documented that there is no relationship between parents’ sexual orientation and any measure of a child’s emotional, psychosocial, and behavioral adjustment.”¹¹⁹ Numerous professional associations have adopted this view and thus expressed

¹¹⁷ Gallagher, *supra* note 24, at 1.

¹¹⁸ *Id.*

¹¹⁹ Pawelski, *supra* note 8, at 359.

their support for same-sex marriage. The American Psychological Association states “results of research suggest that the development, adjustment, and well-being of children with lesbian and gay parents do not differ markedly from that of children with heterosexual parents.”¹²⁰ In addition, the American Psychiatric Association’s position statement on same-sex marriage is “no research has shown that children raised by lesbian and gay men are less well adjusted than those reared within heterosexual relationships.” There are numerous other organizations that endorse the view that same-sex parenting is just as “good” as heterosexual parenting.¹²¹

A new perspective that has emerged from recent research on same-sex parenting is that the quality of parental relationships matter much more than the structural makeup of those relationships. “Children apparently are more powerfully influenced by family processes and relationships than by family structure.”¹²² What is important to children is not the sexual orientation of their parents, but a healthy relationship between those parents. Children’s relationships with their parents are also more important. “More important to youth than the

¹²⁰ American Psychological Association, *APA Policy Statement, Sexual Orientation, Parents and Children*, July 28-30.

¹²¹ See the Child Welfare League of America, American Medical Association, American Psychiatric Association, American Psychological Association, American Academy of Child and Adolescent Psychiatry, North American Council on Adoptable Children, and American Academy of Family Physicians.

¹²² Perrin, *supra* note 61, at 341.

gender of their parent's partner is the quality of daily interaction and the strength of relationships with the parents they have."¹²³

CONCLUSION

Based on recent data on children raised by same-sex parents, as well as the acknowledgement by professional associations that there are no differences between children raised by same-sex parents and children raised by heterosexual parents, the courts should not be coming out on either side of the child welfare argument. The consistent conclusion should be that the child welfare argument fails.¹²⁴

As society changes and the family structure evolves, we are forced to rethink our traditional notions of how children should grow up. What may have been a pervasive argument in the past is no longer a justification for prohibiting same-sex marriage. Research shows that children raised by same-sex parents develop no differently than children raised by heterosexual parents.

So if sexual orientation doesn't matter, then what does matter? The answer comes as no surprise. What really matters is the quality of those relationships, not the structure of them. A

¹²³ Patterson, *supra* note 44, at 243.

¹²⁴ There is of course the problem of judicial deference to legislative judgments.

loving, nurturing, supportive environment is essential to a child's healthy development, not the sexual orientation of their parents.